IN THE SUPREME COURT OF THE STATE OF NEVADA

PASQUAL ANDRES MCMURRY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86646

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Appellant Pasqual Andres McMurry argues that the district court erred in rejecting claims that trial and appellate counsel provided ineffective assistance. To demonstrate ineffective assistance of trial counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and that prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*); *see also Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996) (applying *Strickland* to claims of ineffective assistance of appellate counsel). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 687. An evidentiary hearing is warranted only if the petitioner's claims are supported by specific factual allegations that are not belied by the record and that, if true, would entitle the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

McMurry first argues that trial and appellate counsel should have challenged the kidnapping conviction as incidental to the sexual assault convictions because the assault occurred in the victim's hotel room and she was not moved elsewhere. Dual convictions for kidnapping and sexual assault are proper where the restraint "of the victim substantially exceeds that required to complete the associated crime charged" or "stands alone with independent significance from the underlying charge." *Mendoza v. State*, 122 Nev. 267, 274-75, 130 P.3d 176, 180-81 (2006). The evidence at trial showed that after sexually assaulting and battering K.J. in a hotel room, McMurry walked around the room ranting, sporadically struck K.J., and threatened to kill K.J. and her family if she left the room. McMurry then sexually assaulted K.J. several more times. K.J. complied to avoid further batteries. After sexually assaulting K.J., McMurry ordered K.J. not to move and briefly strangled her. K.J. eventually asked to use the bathroom and managed to flee the room. Under these facts, K.J.'s detention, facilitated by McMurry's batteries and threats, was substantially in excess of and independently significant of the confinement necessary to perpetrate the sexual assaults. Thus, the evidence supported the dual convictions, and McMurry has failed to show that trial or appellate counsel omitted a meritorious issue. Accordingly, McMurry has not shown that the district court erred in denying this claim.

McMurry next argues that trial and appellate counsel should have challenged the district court's decision to question Juror 10 outside McMurry's presence about an issue involving spectators in the gallery during trial. McMurry argues that he should have been present because the questioning could have revealed juror bias and he could have provided counsel with more information about the spectators. McMurry has not

demonstrated deficient performance. Although a defendant has a right to be present at every critical stage of a criminal proceeding, that right is not absolute. *Chaparro v. State*, 137 Nev. 665, 667-68, 497 P.3d 1187, 1191 (2021). To warrant relief, a "defendant must show that he was prejudiced by the absence." *Kirksey*, 112 Nev. at 1000, 923 P.2d at 1115. The circumstances at issue here do not suggest any prejudice as a result of McMurry's absence. McMurry failed to explain what he could have contributed or what would have changed had he been present when the trial judge and counsel discussed the issue. Further, the situation was minor in scope, the spectators did not actually interact with any juror, the juror most interested in the situation reported no bias as a result of it, and the judge and counsel regarded the matter as a potential distraction but not a concern. Accordingly, McMurry has failed to show that trial or appellate counsel omitted a meritorious challenge on this basis. Therefore, McMurry has not shown that the district court erred in denying this claim.

McMurry next argues that trial and appellate counsel should have challenged the district court's decision not to question other jurors about the matter involving McMurry's family members in the gallery. Juror 10 stated that two other jurors briefly discussed with him that they observed the behavior as well. The district court noted that neither of the others felt compelled to raise the matter to the court's attention. To avoid highlighting the matter, the district court declined to question the other jurors. McMurry's counsel expressed approval. McMurry has provided no authority indicating that trial or appellate counsel's assent in this regard could provide a basis for a meritorious challenge. Accordingly, McMurry failed to demonstrate deficient performance. Therefore, McMurry has failed to show that the district court erred in denying this claim.

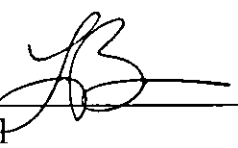
McMurry next argues that two jury instructions violated due process. This argument could have been raised at trial or on direct appeal and was thus procedurally barred. *See* NRS 34.810(1)(b). Although the district court improperly considered the merits of this claim, it reached the correct outcome in denying the claim without conducting an evidentiary hearing.

Lastly, McMurry argues that the cumulative effect of errors warrants relief. Even if multiple instances of deficient performance may be cumulated to demonstrate prejudice, *see McConnell v. State*, 125 Nev. 243, 259 & n.17, 212 P.3d 307, 318 & n.17 (2009), McMurry did not demonstrate any instances of deficient performance to cumulate, *see Morgan v. State*, 134 Nev. 200, 201 n.1, 416 P.3d 212, 217 n.1 (2018).

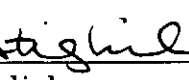
Having considered McMurry's contentions and concluding that they do not warrant relief, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Herndon



_____, J.
Bell



_____, J.
Stiglich

cc: Hon. Kathleen E. Delaney, District Judge
Law Office of Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk